

SERVED: May 25, 2006

NTSB Order No. EA-5223

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of May, 2006

_____)	
APPLICATION OF)	
)	
RAYMOND L. KEITH)	
)	Docket 315-EAJA-SE-17199
)	
For an award of attorney)	
fees and expenses under the)	
Equal Access to Justice Act)	
)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the Equal Access to Justice Act (EAJA) written initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., served on March 8, 2005.¹ The law judge granted applicant's EAJA application. The Administrator has appealed that decision, and argues that her complaint against applicant was substantially justified, and

¹ A copy of the law judge's initial decision and order is attached.

that awarding attorney's fees under EAJA² is consequently inappropriate. We grant the Administrator's appeal.

On February 10, 2005, the Administrator issued an amended order suspending applicant's airline transport pilot certificate for 30 days.³ In the order, the Administrator alleged that on March 3, 2004, applicant violated a Notice to Airman (NOTAM) when he was acting as pilot-in-command (PIC) of a Lear 55 aircraft in the vicinity of Gaithersburg, Maryland, by entering the ADIZ without complying with the requirements of the NOTAM.⁴ As a result, the Administrator alleged that applicant had violated 14 C.F.R. §§ 91.13(a),⁵ 91.103,⁶ 91.139(c),⁷ 99.7,⁸ and 99.11(a).⁹

² Equal Access to Justice Act, 5 U.S.C. § 504; see also 49 C.F.R. pt. 826.

³ Despite the Administrator's 30-day suspension of applicant's certificate, applicant established that he was exempt from such a suspension because he fulfilled the requirements of the Aviation Safety Reporting Program (ASRP). Aviation Safety Reporting Program, Advisory Circular 00-46D (Feb. 26, 1997).

⁴ NOTAM No. 3/2126, which became effective on March 18, 2003, prohibits entry into the "Washington DC metropolitan area Air Defense Identification Zone (DC ADIZ)," unless aircraft operators fulfill seven requirements, including establishing two-way radio communications with air traffic control (ATC), obtaining a discrete transponder code, and filing and activating an approved flight plan prior to entering the DC ADIZ. Exhibit J-4 at 2.

⁵ Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

⁶ Section 91.103 requires pilots-in-command to become

Upon reviewing the evidence, the law judge dismissed the Administrator's complaint, concluding that applicant had reasonably relied upon his co-pilot to obtain clearance from ATC to enter the ADIZ, and therefore was not culpable for his aircraft's unauthorized entry into the ADIZ. Transcript (Tr.) 328, 334. Based on this conclusion, the law judge also granted applicant's application for attorney's fees under EAJA, finding that the Administrator was not substantially justified in pursuing the charges. The Administrator has appealed the law judge's EAJA decision.

Under EAJA, we will not award certain attorney's fees and other specified costs if the government is shown to have been substantially justified in pursuing its complaint. 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2

(continued)

familiar with all available information concerning their flight prior to take-off.

⁷ Section 91.139(c) states that when a NOTAM has been issued under this section, no person may operate an aircraft within the designated airspace "except in accordance with the authorizations, terms, and conditions prescribed in the regulation covered by the NOTAM."

⁸ Section 99.7 requires each person operating an aircraft in the DC ADIZ to comply with the Administrator's special security instructions in the interest of national security.

⁹ Section 99.11(a) states that, unless otherwise authorized by ATC, no person may operate an aircraft into, within, or across the ADIZ unless that person has filed a flight plan with an appropriate aeronautical facility.

(1992). The Supreme Court has defined the term “substantially justified” to mean that the government must show that its position is reasonable in both fact and law. Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993). Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter. Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (stating that Congress intended EAJA awards to dissuade the government from pursuing “weak or tenuous” cases).

We have previously recognized that EAJA’s substantial justification test is less demanding than the Administrator’s burden of proof when arguing the merits of the underlying complaint. U.S. Jet, supra, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)). In Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986), the D.C. Circuit stated that the merits phase of a case is separate and distinct from the EAJA phase. As such, we are compelled to engage in an independent evaluation of the circumstances that led to the Administrator’s original complaint, and determine whether the Administrator was substantially justified in pursuing the case based on those circumstances. Id. at 1087.

In this case, applicant argued that he reasonably relied upon his co-pilot, as second-in-command, to oversee all communications with ATC, and to obtain clearance to enter the ADIZ. Applicant's co-pilot, Mr. Eric Hatfield, was a more experienced pilot and had previously flown with applicant. Tr. 110. As such, applicant testified that he trusted Mr. Hatfield to keep him informed of important ATC communications, such as ATC's instruction to remain outside the ADIZ. Tr. 115. Applicant, however, testified that Mr. Hatfield never informed him of this instruction, and applicant therefore allowed his aircraft to enter the ADIZ under the assumption that they had obtained permission from ATC. Tr. 125. Conversely, Mr. Hatfield testified that he informed applicant that they should stick to their pre-planned flight plan because they needed to avoid entering the ADIZ: "I said, 'If we go to the first fix that you filed on J6 and then follow J6, it would keep us clear.'" Tr. 70. Mr. Hatfield presumed that applicant heard this statement and knew they had not received clearance to enter the ADIZ because they were both listening to the same frequency in their two-way radio communications with ATC (Tr. 39), and because applicant had directed Mr. Hatfield to obtain clearance from ATC more than once (Tr. 48-49).

In presenting this "reasonable reliance" argument, applicant relied heavily on the principle we articulated in Administrator v. Fay & Takacs, NTSB Order No. EA-3501 (1992), wherein we held that, "[i]f ... a particular task is the responsibility of another, if the pilot-in-command has no independent obligation (e.g., based on the operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found." Id. at 4. Applicant also cites Administrator v. Bass, NTSB Order No. EA-3507 (1992), wherein we "declined to hold the PIC culpable for FAR [Federal Aviation Regulations] violations caused by the action (or inaction) of another, when the PIC had no reason or basis to look behind or question either that other individual's representation or performance of assigned duties." Id. at 2.

The doctrine of reasonable reliance is a narrow one.¹⁰ We cannot find that its application to the undisputed facts of this

¹⁰ See Administrator v. Doreen, NTSB Order No. EA-4778 at 2 (1999) (stating that Fay & Takacs did not apply because respondent had an independent obligation to repeat clearance out loud, and because respondent had the ability to ascertain the correct clearance); Administrator v. Nutsch, NTSB Order No. EA-4148 (1994), aff'd 55 F.3d 684 (D.C. Cir. 1995) (respondent did not satisfy the duties of a reasonably prudent pilot when he assumed co-pilot would correctly enter altitude); Administrator v. Buboltz, NTSB Order No. EA-3907 at 2 (1993) (finding that respondent did not satisfy Fay & Takacs reliance test because

case was so clear that the Administrator had no substantial justification for pursuing the case. The doctrine could only excuse applicant's violation if applicant proved that he had no independent obligation or ability to ascertain whether the flight was cleared to enter the ADIZ, and no reason to question his first officer's performance. We think that the Administrator had a reasonable basis for proceeding with this case on all three grounds. First, the Administrator could have argued that, as the flying pilot, applicant had an independent obligation to confirm whether or not the flight was cleared to enter the ADIZ.¹¹ Second, the Administrator could also have argued that, because he was listening to the ATC transmissions over his headphones, applicant had the ability to ascertain whether or not the flight was cleared to enter the ADIZ.¹² And third, we think the Administrator made a plausible argument that

(continued)

respondent had reason to question the first officer's characterization of a clearance, and because respondent had the ability and opportunity to ascertain whether his flight was cleared); Administrator v. Papadakis, 2 NTSB 2311, 2313 (1976) (finding that respondent should have inquired about his first officer's programming of altitude alert digital setting).

¹¹ See Doreen, supra, n.10.

¹² Applicant's repeated instructions to his first officer to obtain a clearance suggest that he had heard no such clearance issued to the flight.

applicant had reason to question any statement from the first officer that the flight had been cleared to enter the ADIZ.¹³

Moreover, Mr. Hatfield testified that he informed applicant of ATC's instruction to refrain from entering the ADIZ, and that, in any event, applicant could have heard all his communications as he was also hearing them on his headset, but applicant testified that he had no idea that Mr. Hatfield had not obtained clearance from ATC. Regarding applicant's suggestion that Mr. Hatfield may have changed frequencies without telling him, we think the Administrator could have reasonably believed (as an FAA safety inspector testified) that applicant would have most likely noticed when Mr. Hatfield was changing frequencies while attempting to obtain clearance for entering the ADIZ. Tr. 238. Because resolution of the matter at issue rested so prominently on the law judge's determination of witness credibility, we do not find convincing applicant's argument that the Administrator pursued this case with no substantial justification. Accordingly, we will not award attorney's fees under EAJA.¹⁴

¹³ See Tr. 268-269, where the Administrator's counsel pointed out in closing argument that the purported ATC clearance to enter the ADIZ would have contradicted the flight plan that applicant had filed, and that he should have questioned his first officer about such a deviation.

¹⁴ "[W]hen key factual issues hinge on witness credibility,

In addition, applicant relies heavily on a provision in his employer's operations manual, which states that, "[t]he First Officer is responsible for ... [a]iding the Captain in safe and efficient conduct of the communications with ATC and company." Nashville Jet Charters, Inc. Operations Manual at 2-7 (May 7, 2003). While applicant had clearly delegated duties involving ATC communications to Mr. Hatfield, this provision of the manual is not dispositive for purposes of applicant's reasonable reliance argument. First, the language of the manual on which applicant relies merely states that the first officer should "aid" the pilot-in-command with ATC communications, not be solely responsible for all such communications. Secondly, the manual also provides that, "[a] Captain is responsible for any actions or duties required or conducted by other flight crewmembers assigned to the PIC's flight." Id. at 2-6. Therefore, we do not find applicant's argument regarding the Operations Manual persuasive.

(continued)

the Administrator is substantially justified - absent some additional dispositive evidence - in proceeding to a hearing where credibility judgments can be made." Application of Fuller, NTSB Order No. EA-5136 at 7 (2005); see also Administrator v. Caruso, NTSB Order No. EA-4165 (1994); Administrator v. Conahan, NTSB Order No. EA-4276 (1994); Administrator v. Martin, NTSB Order No. EA-4280 (1994).

Overall, we find that the Administrator was substantially justified in charging applicant with violating applicable Federal Aviation Regulations when applicant entered the ADIZ in violation of the NOTAM. The Administrator's allegations were reasonable in fact and in law, because the Administrator had sufficient, reliable evidence to pursue the charges against applicant. Applicant admitted to entering the ADIZ without permission from ATC, and only much later presented the affirmative defense of reasonable reliance. Such admissions lend credence to the Administrator's initial pursuit of her charges. In sum, we do not find that applicant is entitled to an award of fees under EAJA.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and
2. The law judge's initial decision granting the application for attorney's fees and expenses is reversed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.